

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>FRANK CHENOWETH</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 190,560
<b>ENRON PIPELINE OPERATIONS</b>	)	
Respondent	)	
AND	)	
	)	
<b>AETNA SURETY &amp; CASUALTY COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>KANSAS WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent and its insurance carrier appeal from the July 19, 1996, Award entered by Administrative Law Judge Jon L. Frobish.

**APPEARANCES**

Claimant appeared by his attorney, Kerry McQueen of Liberal, Kansas. Respondent and its insurance carrier appeared by their attorney, David M. Druten of Kansas City, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Gail Carpenter of Great Bend, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The Appeals Board reviewed and considered the record and adopted the stipulations listed in the Award. In addition, the findings and conclusions of the Administrative Law Judge pertaining to issues which were not raised on appeal were deemed admitted by the parties.

**ISSUES**

In their Request for Board Review, respondent and its insurance carrier raised the following issues:

- (1) Whether the claimant's injuries arose out of and in the course of his employment with respondent.
- (2) The nature and extent of claimant's disability, if any.
- (3) Liability of the Workers Compensation Fund (Fund).

It was announced at the time of oral argument before the Appeals Board that the respondent and the Fund had reached an agreement whereby each would be responsible for one-half of the award. Therefore, Fund liability was no longer an issue.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed and considered the entire record, together with the briefs and arguments of the parties, the Appeals Board finds as follows:

Claimant alleged injury by a series of accidents with continuous aggravations up to April 21, 1993. The Administrative Law Judge, citing Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995), used April 21, 1993, as the date of accident for the purpose of computation of the award. That issue was not appealed. However, respondent did appeal the issue of whether claimant's accident arose out of and in the course of his employment. In deciding this issue, the Administrative Law Judge observed:

"Other than not admitting this as a stipulated fact, the respondent has not pursued this defense. The respondent has not provided any evidence to controvert the evidence submitted by the claimant, nor has the respondent argued this issue beyond a denial."

The situation has changed little since the entry of the Award. Respondent had not provided a submission letter to the Administrative Law Judge and respondent submitted no brief to the Appeals Board. Therefore, other than raising the issue of arising out of and in the course of employment in its application for review, respondent has done little to enlighten the Appeals Board as to the basis for respondent's denial that claimant suffered injury by accidents arising out of and in the course of his employment. At oral argument respondent stated that it was claimant's burden to prove accident arising out of and in the course of employment and that even though claimant denied prior wrist problems, he had in fact seen a chiropractor and reported wrist symptoms shortly before his alleged dates of accident.

Claimant started working for respondent in September 1979. His job duties involved the repair and maintenance of large engines. He used large hand tools including pipe wrenches, open-end wrenches, and sledgehammers as well as power tools including jackhammers. On April 21, 1993, claimant was injured while using a slidehammer to remove bushings from a engine piston. His injury initially involved primarily the right hand but eventually included both

hands, arms, and shoulders. Although claimant alleged a series of accidents, he also related the specific event which occurred on April 21, 1993.

Claimant testified that before he developed wrist problems working for respondent, he had treated with a chiropractor in Liberal, Kansas, by the name of Dr. John Smith and later with a Dr. Gerald R. Walter in Hugoton. He saw Dr. Smith primarily for back problems but he also mentioned having problems with his wrists. Claimant reported tingling and numbness in his wrists bilaterally to Dr. Walter on April 1 and April 5, 1993. This could be significant were claimant alleging an injury by a single accident occurring April 21, 1993. However, claimant is alleging a series of accidents with injury from cumulative trauma. There is nothing in the records of Dr. Walter which is inconsistent with claimant's allegations as to the mechanisms of his injuries. Dr. Walter noted that claimant's complaints did change dramatically between April 1 and April 22 when claimant reported severe and constant bilateral wrist and hand pain. Dr. Walter changed his diagnosis from carpal tunnel syndrome to rheumatoid arthritis. Despite claimant having had wrist problems for several years prior to April 1993, the evidence points to claimant's employment with respondent as the cause for his present condition.

John H. Gilbert, M.D., an orthopedic surgeon in Garden City, Kansas, treated claimant in May of 1993. His impression was of exertionally-related hand pain attributed to hand intensive labor and occupational adjustment reaction. Dr. Gilbert did not consider surgical treatment to be warranted. He rated claimant as having a 5 percent permanent impairment of each upper extremity which is the equivalent of a 6 percent whole body impairment. Dr. Gilbert attributed claimant's impairment to degenerative joint disease. Although he released claimant to return to work with some restrictions, Dr. Gilbert was supportive of claimant's expressed intention of finding alternative employment which would be less strenuous or heavy.

At the request of his treating physician, claimant was also examined by Richard M. High, M.D., to rule out cubital tunnel syndrome, median nerve compression, or post-traumatic Kienböck's disease. Based upon his normal EMG, Dr. High determined claimant was not a candidate for surgery and rated his bilateral upper extremity condition at 8 percent to the body as a whole.

Claimant was examined by George G. Fluter, M.D., a Wichita physician board-certified in internal medicine, on April 7, 1994. Dr. Fluter diagnosed a cumulative trauma disorder caused by repetitive use of his hands, wrists, and arms in his employment. The cumulative trauma disorder affected primarily the wrists and hands and he assigned a 5 percent permanent partial impairment to the whole body using the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). Dr. Fluter related claimant's impairment to his employment by history and recommended that claimant restrict his work to jobs that fall within the medium to medium-heavy level of physical demand. Dr. Fluter also stated that claimant would have a 6 percent permanent partial impairment to the whole body based upon limitation in his shoulder range of motion. However, since the claimant's complaints focused upon his wrist and hands as opposed to the shoulders, Dr. Fluter did not seem to attribute the shoulder condition to the employment or understand it to be a part of the purpose for his evaluation of claimant.

The parties stipulated to a 6.5 percent whole body functional impairment.

Because his is an unscheduled injury, claimant is entitled to permanent partial disability benefits based upon K.S.A. 1992 Supp. 44-510e(a) which states:

“The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee’s education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment.”

The Administrative Law Judge awarded a 36.5 percent permanent partial general disability based upon the testimony of vocational expert Jerry D. Hardin. Mr. Hardin testified that claimant suffered a 20 percent loss of ability to perform work in the open labor market and a 53 percent loss of ability to earn a comparable wage. Utilizing the formula approved in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), both factors of the two-part test were given equal weight to arrive at the percentage of work disability. The Appeals Board affirms this finding.

Due to corporate downsizing and the potential elimination of claimant’s job, claimant accepted a voluntary termination package from his employer. Respondent argues that claimant’s “voluntary retirement” should preclude him from receiving a work disability in excess of his functional impairment. The Appeals Board disagrees. Claimant did eventually return to gainful employment following a period of vocational rehabilitation and education. The Appeals Board has held that retirement is not the equivalent of removing oneself from the open labor market or refusing to accept work so as to invoke the policy considerations of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). Furthermore, in Brown v. City of Wichita, 17 Kan. App. 2d 72, 832 P.2d 365 (1992) the court held that voluntary retirement does not affect permanent partial general disability benefits.

The claimant continued to work for respondent until August 31, 1993. Accordingly, he would not be entitled to a work disability during the period of April 21, 1993, through August 31, 1993, when he was working and earning a comparable wage. Therefore, the Award by the Administrative Law Judge should be modified to award functional impairment only until August 31, 1993. Also, claimant’s average weekly wage of \$623.76 would not include the value of the fringe benefits totaling \$299.69 until those benefits were terminated when claimant stopped working for respondent.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish dated July 19, 1996, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Frank Chenoweth, and against the respondent, Enron Pipeline Operations, and its insurance carrier, Aetna Surety & Casualty Company, and the Workers Compensation Fund for an accidental injury which

occurred April 21, 1993, and based upon an average weekly wage of \$623.76 for .71 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$212.29, followed by 18.86 weeks of permanent partial disability compensation at the rate of \$27.03 per week or \$509.79, for a 6.5% permanent partial general disability, followed by 395.43 weeks at the rate of \$224.72 per week or \$88,861.03, for a 36.5% permanent partial general disability based upon an average weekly wage of \$923.45, making a total award of \$89,583.11.

As of November 1, 1997, there is due and owing claimant .71 weeks of temporary total disability compensation at the rate of \$299.00 per week or \$212.29, followed by 18.86 weeks of permanent partial disability compensation at the rate of \$27.03 per week in the sum of \$509.79 followed by 216.86 weeks of permanent partial disability compensation at the rate of \$224.72 in the sum of \$48,732.78, for a total of \$49,454.86, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$40,128.25 is to be paid for 178.57 weeks at the rate of \$224.72 per week, until fully paid or further order of the Director.

All other and remaining orders of the Administrative Law Judge are hereby adopted by the Appeals Board as its own.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Kerry McQueen, Liberal, KS  
David M. Druten, Kansas City, KS  
Gail Carpenter, Great Bend, KS  
Office of Administrative Law Judge, Garden City, KS  
Philip S. Harness, Director